Supreme Court, U.S.
FILED
AUG 2 1996
OFFICE OF THE CLERK

No. 95-1863

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES KLINGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly determined that petitioners failed to exhaust their administrative remedies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1 - A13) is unpublished, but the decision is noted at 74 F.3d 1226 (Table). The opinion of the district court (Pet. App. C1 - C7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1995. A petition for rehearing was denied on February 8, 1996. Pet. App. B1-B2. The petition for a writ of certiorari was filed on May 8, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1989, pursuant to a collective bargaining agreement, Local 2004 of the American Federation of Government Employees filed a grievance against the Department of the Army and the Defense Logistics Agency (DLA or the agency), claiming that bargaining unit employees at the New Cumberland Army Depot had been exposed to asbestos. Pet. App. A2-A3. An arbitrator awarded "environmental differential pay" to those employees, and the Federal Labor Relations Authority upheld the award. *Id.* at A3. In 1992, DLA and Local 2004 entered into a settlement agreement, which provided that each bargaining unit employee would be paid an amount, up to a maximum of $5,085 per employee, based on the duration of the employee's exposure to the asbestos. *Id.* at A3-A4 & n.1.

Petitioners, James Klinger and Barbara J. McClain, are supervisory employees at the Depot. Pet. App. A2. Although petitioners worked in the same areas of the Depot as the other employees, supervisors are not members of the Local 2004 bargaining unit, and petitioners therefore were not parties to the settlement. *Id.* at A4. Petitioners nonetheless sent several letters to the DLA requesting differential pay, each time basing those requests on the DLA's settlement agreement with the bargaining unit employees. The DLA denied these requests on the ground that the agreement did not cover petitioners. *Id.* at A9-A10.

In 1994, petitioners filed suit in federal district court. They based their claim to differential pay on 5 U.S.C. 5341, which sets forth the "policy of Congress" with regard to the "rates of pay of prevailing

rate employees." One of the principles governing such rates is that "there will be equal pay for substantially equal work for all prevailing rate employees who are working under similar conditions of employment in all agencies within the same local wage area." Pet. App. A5-A6. Petitioners argued that, because they had been subjected to the same working environment as the bargaining unit employees, Section 5341 gave them a right to the same environmental differential pay as the other employees. Pet. App. A6. It is upon this underlying claim for differential pay under Section 5341 that petitioners have based their claim for retroactive relief under the Back Pay Act, 5 U.S.C. 5596. See Pet. 11.

The district court dismissed petitioners' claim. Pet. App. C7. The court held that petitioners had failed to exhaust their administrative remedies because, in their letters to the agency, they had based their claim to differential payment, not on any rights they may have under Section 5341, but on the settlement agreement between Local 2004 and the DLA. Pet. App. C6.

The court of appeals affirmed. It held that petitioners had never presented the agency with claims independent of the settlement agreement and, in particular, that they had "not made an independent record demonstrating their independent right to differential pay." Pet. App. A11. Because petitioners had therefore "not given their Agency an opportunity to consider their claim for environmental differential pay," *ibid.*, the court of appeals upheld the district court's decision to dismiss their claim for failure to exhaust administrative remedies.

ARGUMENT

Like other statutes creating causes of action against federal agencies, the Back Pay Act and its implementing regulations require claimants to exhaust administrative remedies before seeking judicial review. 5 U.S.C. 5596(b)(1); see also 4 C.F.R. 31.4 ("A claimant should file his or her claim with the administrative department or agency out of whose activities the claim arose."); *Walker* v. *United States*, 179 Ct. Cl. 723 (1967), cert. denied, 389 U.S. 1036 (1968); see generally *Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Petitioners do not contend otherwise. Rather, they argue that they did in fact exhaust their administrative remedies. In their letters to the DLA, however, petitioners did not cite either the Back Pay Act or 5 U.S.C. 5341, the provision on which they base their substantive argument for differential pay.

Petitioners cite several cases (involving statutes other than the Back Pay Act and Section 5341) for the proposition that claimants can satisfy the exhaustion requirement by providing their agencies with the broad outline of their claims, even if they do not specifically invoke the legal provision upon which they later base their claim for judicial relief. See Pet. 16-17. Those decisions appear inconsistent with the view of the court below (see Pet. App. A11) that petitioners' failure to invoke Section 5341 in their administrative claims constituted a violation of the exhaustion requirement.

Whether or not petitioners have exhausted their administrative remedies with respect to Section 5341, however, they have no cause of action under the Back Pay Act, the only basis for relief mentioned in the

question presented in their petition (see Pet. i, 13; see also Pet. 11).[1] The Act "creates no alternative cause of action," but is instead "an auxiliary measure that operates only at the relief stage. It furnishes relief only *after* an 'appropriate authority' finds that, under some *other* provision of law, a federal employee has suffered an 'unjustified or unwarranted personnel action.'" *Brown* v. *Secretary of the Army*, 918 F.2d 214, 217 (D.C. Cir. 1990) (emphasis added) (quoting 5 U.S.C. 5596(b)(1)), cert. denied, 502 U.S. 810 (1991). Thus, a "plaintiff may not recover anything under the Back Pay Act unless and until he or she has * * * *succeeded* on the merits" of the substantive claim that assertedly creates the derivative right to back pay. 918 F.2d at 217-218 (emphasis added). Here, petitioners have never—in any forum—"succeeded on the merits" of their substantive claim to differential pay under Section 5341. They therefore have no basis for seeking relief from this Court under the Back Pay Act.

Moreover, even if an "appropriate authority" *had* issued a finding that Section 5341 grants petitioners a

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[1] It is also doubtful that petitioners have a valid claim under Section 5341, which sets forth a federal policy of "equal pay for substantially equal work." The supervisory work that petitioners perform is not in fact "substantially equal" to the work of the non-supervisory personnel covered by the settlement agreement. Moreover, although Section 5341 and related provisions may, under certain circumstances, permit employees to challenge the wage grade classification of a category of federal jobs, see generally *Barnhart* v. *Devine*, 771 F.2d 1515 (D.C. Cir. 1985); *Haneke* v. *Secretary of Health, Educ. & Welfare*, 535 F.2d 1291 (D.C. Cir. 1976), it does not create a cause of action entitling supervisory, non-bargaining-unit employees to the benefits of collective bargaining settlement agreements.

substantive right to differential pay, petitioners still would have no valid claim to back pay. Relief under the Back Pay Act is governed by 5 U.S.C. 5596(b)(1). See *Brown*, 918 F.2d at 218; see also Pet. 11. Under that provision, "a federal employee seeking to recover under the Act must be found 'to have been affected by an unjustified or unwarranted personnel action which has resulted in the *withdrawal or reduction* of all or part of [his or her compensation].'" *Brown*, 918 F.2d at 218 (emphasis partially deleted; brackets in original) (quoting 5 U.S.C. 5596(b)(1)). Here, petitioners have not, and could not have, alleged that the denial of *additional* pay to compensate for certain environmental hazards "resulted in the withdrawal or reduction" of their compensation. That fact alone is fatal to petitioners' Back Pay Act claim. See 918 F.2d at 218-221; accord *Spagnola* v. *Stockman*, 732 F.2d 908 (Fed. Cir. 1984); see also *United States* v. *Testan*, 424 U.S. 392 (1976).[2]

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[2] The *Brown* Court identified a single circumstance under which a simple "failure * * * to confer a benefit," 5 U.S.C. 5596(b)(4), could give rise to a claim under the Back Pay Act: where an agency has improperly failed to confer a "mandatory," "nondiscretionary," and "virtually automatic" benefit or payment that is "*required* by law (a statute or regulation)." *Brown* v. *Secretary of the Army*, 918 F.2d at 220 (internal quotation marks omitted). Petitioners' claim does not fall into that category.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1996